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In the Supreme Court of the United States

No. _____

OCTOBER TERM, 1964.

THE HANNA MINING COMPANY,
NATIONAL STEEL CORPORATION,
HANSAND STEAMSHIP CORPORATION, and
THE HANNA FURNACE CORPORATION,

Petitioners,

vs.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, an unincorporated association, RAYMOND T. McKAY, its President, MELVIN H. PELFREY, Secretary-Treasurer, CHARLES E. LaPORTE, Vice President, FRANK LECKIE, Field Representative, and JOHN DOE AND RICHARD ROE, and other individuals whose names are unknown, pickets at Great Northern Railway Company Ore Docks, Superior, Wisconsin,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Wisconsin.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Wisconsin entered in the above-entitled cause on April 13, 1964, motion for rehearing denied on June 30, 1964.

THE OPINIONS BELOW.

The Opinion of the Circuit Court for Douglas County, Wisconsin, dated July 25, 1963, and the Order thereon, dated July 26, 1963, have not been reported and are printed in the Appendix at pages 41-45, *infra*.

The Opinion of the Supreme Court of the State of Wisconsin, dated April 13, 1964, and Order denying a rehearing dated June 30, 1964, are reported in 23 Wis. (2d) 433, 127 N. W. (2d) 393, and printed in the Appendix at pages 29-41, *infra*.

JURISDICTION.

The Judgment of the Supreme Court of Wisconsin was rendered on April 13, 1964 and petitioners' Motion for Rehearing was denied on June 30, 1964, thus affirming the Order of the Circuit Court for Douglas County, Wisconsin, dismissing petitioners' amended complaint for injunctive relief against recognition and organizational picketing of petitioners' vessels by respondent labor organization in the port of Superior, Wisconsin, in a controversy involving representation of marine engineers who had been held to be supervisors by the National Labor Relations Board. The jurisdiction of this Court is invoked under Title 28, U. S. C. A., Section 1257.

QUESTIONS PRESENTED.

1. Whether or not the determinations of the General Counsel of the National Labor Relations Board affirming the dismissal of unfair labor practice charges filed under the Labor Management Relations Act, as amended, Title 29, U. S. C. A., § 141, et seq., should be accorded final legal significance upon the question of jurisdiction by the Wisconsin courts as "initial determinations" of the National Labor Relations Board within the meaning of this Court's decision in *San Diego Unions v. Garmon,* 359 U. S. 236.

2. Whether or not the state courts of Wisconsin may exercise jurisdiction to enjoin respondent labor organiza-

tion from conducting recognition and organizational picketing of petitioners' vessels in Superior, Wisconsin, which is illegal under Wisconsin law after the following initial determinations were obtained by the petitioners from the National Labor Relations Board:

(a) A dismissal of a petition for a representation election by a Regional Director and affirmed by the National Labor Relations Board upon a finding that the petitioners' marine engineers directly involved are supervisors excluded from the coverage of the Labor Management Relations Act, as amended, Title 29, U. S. C. A., § 141, et seq.;

(b) Rulings by the General Counsel of the National Labor Relations Board affirming a Regional Director that the supervisory status of the marine engineers involved precludes any application of Section 8(b)(7) of the Act to limit and restrain recogtition and organizational picketing; and

(c) A ruling by the General Counsel of the National Labor Relations Board affirming a Regional Director that there was no evidence of any secondary boycott activity prohibited by Section 8(b)(4) of the Act in the conduct of the picketing.

STATUTES INVOLVED.

The statutes involved are material parts of the Labor Management Relations Act, as amended, 29 U. S. C. A. § 141, et seq., consisting of Section 2(3) [29 U. S. C. A. § 152(3)]; Section 8(b)(4) and Section 8(b)(7) [29 U. S. C. A. § 158(b)(4) and (7)]; and Section 14(a) [29 U. S. C. A. § 164(a)]. They are reprinted in the Appendix at pages 47-51, *infra*.

STATEMENT OF THE CASE.*

Petitioners are corporations which own and operate vessels on the Great Lakes transporting cargos in interstate and foreign commerce. The Hanna Mining Company, one of the petitioners, acts as agent and operates all of these vessels as an integrated fleet.

Marine engineers licensed by the United States Coast Guard are employed on petitioners' vessels as ships officers. As part of their duties, the marine engineers supervise the work of unlicensed crew members who are represented by the United Steelworkers of America, AFL-CIO, in a bargaining unit designated by the National Labor Relations Board comprised of the vessel crews of all four petitioners.

The respondent District 2, Marine Engineers Beneficial Association (herein "MEBA") is a labor organization with a membership composed of licensed marine engineers and the remaining respondents are its officers, agents and representatives. It has labor agreements in effect with certain other companies operating vessels on the Great Lakes which contain provisions requiring compulsory Union membership as a condition of employment.

Effective October 4, 1961, petitioners entered into a labor agreement with the MEBA governing the terms of employment of licensed marine engineers employed aboard petitioners' vessels and the agreement terminated on July 15, 1962. Negotiations commenced for a new labor agreement.

During these negotiations in August 1964, a majority of the marine engineers notified the petitioners by means

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* The facts are taken from the verified complaint, as amended, and affidavits, which were dismissed on respondent's motion (R. 9 to 19, 22 to 79), supplemented by exhibits introduced by mutual consent of the parties.

of written petitions that they did not want to be represented by the MEBA. Petitioners promptly notified the MEBA of this development and took the position that further negotiations must be suspended until the question of representation was resolved; that the MEBA should investigate the authenticity of the petitions by consulting with the marine engineers aboard their vessels; and that if the MEBA's investigation failed to confirm the authenticity of the written petitions from the marine engineers, the controversy should be submitted to arbitration. Otherwise, petitioners proposed that a secret ballot election should be conducted by an impartial party to determine whether or not the MEBA represented a majority of such engineers. If such an election demonstrated that the MEBA represented a majority, petitioners advised that they would recognize the MEBA as collective bargaining representative and resume contract negotiations.

In August and September, 1962, MEBA representatives boarded petitioners' vessels and consulted with the marine engineers. Without raising any question regarding the authenticity of the marine engineers' petitions disavowing the MEBA as collective bargaining representative, the MEBA demanded an immediate resumption of contract negotiations. Petitioners refused to recognize the MEBA unless its majority status was established by means of a proper election.

On September 12, 1962, the MEBA commenced picketing the S. S. Joseph H. Thompson, one of petitioners' vessels, at a dock in Duluth, Minnesota, where its cargo was being unloaded. The picket signs read:

"Hanna Mining Unfair
to
Marine Engineers
Beneficial Association
Refuses to Negotiate
Contract
AFL-CIO
No Dispute With Any
Other Employer
S.S. Joseph Thompson"

The dock workers refused to unload the coal cargo from petitioners' vessel because of the picketing. The work stoppage continued until September 28, 1962, when the Thompson left with the remainder of her cargo of coal aboard.

The MEBA also commenced picketing petitioners' vessels at many other Great Lakes ports on September 12, 1962, or soon thereafter, including Superior, Wisconsin. The same picket signs were used with appropriate changes for the name of each vessel.

The MEBA picketing continued until the close of the Great Lakes season of navigation on or about December 1, 1962, when all vessels were laid up, as customary, for the winter months, and the crews were laid off. As a consequence of the MEBA picket lines, petitioners' vessels had been refused tug service at many Great Lakes ports; some dock workers at Superior, Wisconsin, had refused to load iron ore cargos into such vessels; and coal dock workers at Duluth, Minnesota had refused to unload the coal cargo from the S. S. Joseph H. Thompson.

None of the licensed marine engineers, other licensed officers, or the unlicensed seamen employed on petitioners' vessels participated in any of the MEBA picketing activ-

ities and all such personnel continued working steadily aboard petitioners' vessels until the close of the navigation season in 1962. There were no work stoppages of any kind among petitioners' vessel crews.

On September 12, 1962, when the MEBA picketing commenced, petitioners requested the Regional Director of the National Labor Relations Board at Cleveland, Ohio, to conduct a representation election among the licensed marine engineers aboard petitioners' vessels under the Act to determine whether or not the MEBA represented a majority. Upon investigation, the Regional Director dismissed the petition by letter dated September 25, 1962 (R. 86, 87), for the stated reason that the marine engineers were "supervisors" excluded from the coverage of the National Labor Relations Act. Upon appeal, the National Labor Relations Board in Washington affirmed the Regional Director's dismissal by letter dated November 20, 1962 (R. 46, 47), stating that a unit of supervisors is inappropriate for collective bargaining under the Act.

On September 15, 1962, petitioners filed charges with the Regional Director of the National Labor Relations Board in Minneapolis, Minnesota, that the MEBA had engaged in secondary boycott activity violating Section 8(b)(4) of the Act (R. 79, 80). After investigation, the Regional Attorney and Regional Director dismissed the charge by letters dated October 16, 1962 (R. 88 to 89) and October 22, 1962 (R. 92 to 93), which stated that as a consequence of investigation and consideration, it was concluded that no violation of Section 8(b)(4) of the Act is indicated. Upon appeal, the General Counsel of the National Labor Relations Board in Washington affirmed the dismissal of the charge by letter dated December 10, 1962 (R. 48 to 51).

On September 27, 1962, petitioners filed charges with the Regional Director of the NLRB in Cleveland, Ohio, that the picketing of petitioners' vessels with the object of forcing or requiring plaintiffs to recognize or bargain with the MEBA as a representative of its engineers or forcing or requiring such engineers to accept the MEBA as their Union representative violated Section 8(b)(7) of the Act (R. 80 to 81) and that by these and other actions the MEBA has violated the National Labor Relations Act. After investigation, the Regional Director dismissed the charge by letter dated October 5, 1962 (R. 51 to 53).

Upon appeal, the General Counsel of the National Labor Relations Board in Washington affirmed the dismissal by letter dated November 26, 1962 (R. 53 to 55), stating that there was insufficient evidence that the picketing was for an object proscribed by Section 8(b)(7) of the Act since the MEBA was seeking representation rights in a unit composed solely of supervisors as distinguished from employees within the meaning of the Act. In response to petitioners' request for clarification, the General Counsel amplified upon the basis for affirming the Regional Director's action in a letter dated December 21, 1962 (R. 55 to 56), stating that the disposition of this case was predicated solely upon a conclusion that the supervisory status of the licensed engineers precluded a finding that the Union picketing and other activity was for an object proscribed by Section 8(b)(7) of the Act, and having reached a conclusion which, in his view, was dispositive of the charge, the appeal was denied without considering what the posture of the case would have been had the unit personnel been employees within the meaning of the said Act; that in processing the appeal in this manner, the General Counsel's office acted in accordance with its established practice and the General Counsel's office had

no alternative but to deny plaintiff's request for reconsideration.

In May 1963, Great Lakes navigation commenced and petitioners' vessels were placed into operation. The MEBA resumed picketing at Superior, Wisconsin with signs identical with those used in 1962; there had been no picketing activity during the winter while petitioners' vessels were laid up. Tugs refused to serve petitioners' vessels in Superior, Wisconsin, due to the picketing, causing some delays during adverse weather and endangered the ships and their crews in the narrow channels and confined waters of the harbor where navigation can be hazardous without the assistance of tugs. Costly delays occurred to petitioners' vessels. The licensed engineers and other crew members ignored the picketing and continued working steadily on petitioners' vessels.

On June 24, 1963, petitioners filed a verified complaint supported by affidavits (R. 9 to 19, 22 to 79) in the Circuit Court for Douglas County, Wisconsin, praying for injunctive relief against the organizational and recognition picketing conducted by the MEBA. On the following day, the court granted a temporary restraining order against the picketing and issued an order to show cause why an injunction should not be granted. Service was obtained upon the MEBA and its officers and representatives, some of whom had to be served outside of the State of Wisconsin.

The MEBA appeared specially and moved for a dismissal of the complaint on the grounds:

"1) The court lacks jurisdiction over the subject matter in that the National Labor Relations Board has exclusive jurisdiction of the subject matter herein.

"2) The court has no jurisdiction over the persons of the defendants."

An amended complaint was filed by petitioners to clarify the pleadings in response to respondent's arguments that the complaint arguably alleged facts constituting a secondary boycott within the exclusive jurisdiction of the National Labor Relations Board.

On July 25, 1963, the Circuit Court held in a Memorandum Opinion without any hearing on the merits that the court lacked jurisdiction over the subject matter, vacating the restraining order, and dismissing the complaint (R. 1 to 7).

The Circuit Court also entered an order following the Memorandum Opinion on July 26, 1963, finding that the matter before the court is within the jurisdiction of the National Labor Relations Board and that the court is without jurisdiction, dismissing the complaint, denying a restraining order and vacating the temporary restraining order (R. 7 to 9). The claim of the MEBA that the Circuit Court lacked jurisdiction over the persons of the defendants was not pressed.

An appeal was immediately taken by the petitioners from the whole of the Order of the Circuit Court to the Supreme Court of Wisconsin which affirmed the court below on April 13, 1964 (Opinion R. 105 to 116). Petitioners' motion for a rehearing was denied by the Wisconsin Supreme Court on June 30, 1964 (R. 117).

REASONS FOR GRANTING THE WRIT.

I.

The Wisconsin Supreme Court rejected petitioners' contention that the rulings of the General Counsel of the National Labor Relations Board should be accorded final legal significance upon unfair labor practice charges, and stated (R. 10 to 11, App. p. 39, *infra*):

> "Plaintiffs acknowledge the *Garmon* rule to the extent that a state agency or court has no jurisdiction over conduct arguably subject to NLRA until the NLRB has made a final determination that the conduct is not so subject. They stress the references in *Garmon* to the 'exclusive primary competence' and 'primary jurisdiction' of the NLRB and the statement that the determination must be 'left in the first instance' to NLRB, and to the statement in *Marine Engineers v. Interlake Co., Supra,* (p. 185), that 'while the Board's decision is not the last word, it must assuredly be the first.' They argue that the rulings of the General Counsel are determinations of the NLRB. Thus they assert that they have fulfilled the *Garmon* rule for avoidance of conflict between NLRB and courts and state agencies. Since, they would say, it has been finally determined that the conduct complained of is not an unfair labor practice, and presumably that such conduct is not protected by the Act because of the supervisory status of the people who are the object of the MEBA's effort, the state is now free to apply its own law. Bypassing any difference between the conduct now alleged and the conduct complained of in Duluth, Minnesota, plaintiff's logic seems clear, if they properly accord final legal significance to the acts of the General Counsel. But we do not read *Garmon* as permitting this result."

Petitioners submit that rulings of the General Counsel of the National Labor Relations Board must be accorded

the same final legal significance as determinations of the National Labor Relations Board itself upon unfair labor practice charges. Section 3(d) of the Labor Management Relations Act, as amended, 29 U. S. C. A., § 153(d), provides:

> "There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. * * * *He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 168 of this Title and in respect of the prosecution of such complaints before the Board,* and shall have such other duties as the Board may prescribe or may be provided by law." (Emphasis ours.)

In the Committee of Conference, House Report No. 510, June 3, 1947, on the Labor Management Relations Act, 1947, *U. S. Code Congressional Service, 80th Congress, First Session,* 1947, on page 1143:

> "The General Counsel * * * is to have final authority to act in the name of, but independently of any direction, control, or review by, the Board in respect of the investigation of charges and issuance of complaints of unfair labor practices, and in respect of the prosecution of such complaints before the Board."

Under the Rules and Regulations of the National Labor Relations Board, 29 *C. F. R.*, Part 102, Section 102.19, the only review of the refusal of a Regional Director to issue a complaint upon an unfair labor practice charge is by the General Counsel. He has the final authority to determine on behalf of the Board that the Act does not apply to a particular activity. For this reason, there can never be any further determination by the Board itself when the General Counsel declines to issue a complaint based upon a lack of jurisdiction.

Statements of Procedure of the Board, Series 8, as Amended, 29 *C. F. R.*, Part 101, published pursuant to the Administrative Procedure Act, provides under Section 101.6:

> "Dismissal of charges and appeals to general counsel.—If the complainant refuses to withdraw the charge as recommended, the regional director dismisses the charge. The regional director thereupon informs the parties of his action, together with a simple statement of the grounds therefor, and the complainant of his right to appeal to the general counsel in Washington, D. C., within 10 days. If the complainant appeals to the general counsel, the entire file in the case is sent to Washington, D. C., where the case is fully reviewed by the general counsel with the assistance of his staff. Following such review, the general counsel may sustain the regional director's dismissal, stating the grounds of his affirmance, or may direct the regional director to take further action."

The published procedure of the National Labor Relations Board therefore confirms that final action upon any unfair labor practice charge which is dismissed, for lack of jurisdiction, or other grounds, is taken by the General Counsel. Such a charge never reaches the National Labor Relations Board itself and the General Counsel's determination is final.

In *Hourihan v. National Labor Relations Board et al.*, 201 F. 2d 187 on page 188:

> "Section 3(d) of the Labor Management Relations Act provides that the General Counsel of the Board 'shall have final authority on behalf of the Board, with respect to the investigation of the charges and issuance of complaints under Section 10.' The Board cannot issue an order until the General Counsel issues a complaint. A court has no power to order

the General Counsel to issue a complaint and no power to require the Board to issue an order in a matter which is not before the Board."

This Court denied certiorari in the *Hourihan* case, 345 U. S. 930, Rehearing denied 345 U. S. 961, 346 U. S. 843, 346 U. S. 880 and 346 U. S. 917.

In *Lewis v. Labor Board*, 357 U. S. 10, on pages 15-16:

"The Act does not define the term 'party'; but it does make clear that the role of the General Counsel is a major one. By Section 3(d) of the Act, he is given 'final authority' respecting the investigation of charges, the issuance of complaints and the prosecution of complaints before the Board. The General Counsel is, indeed, indispensable to the prosecution of the case. He vindicates the public interest, performing functions previously performed by the Board itself."

In *National Labor Relations Board v. Swift & Co.*, 233 F. 2d 226, on page 231:

"As heretofore noted, the Regional Director and the General Counsel upon appeal both dismissed the charges based upon primary picketing. The General Counsel's dismissal is final and not subject to appeal. 29 U. S. C. A. § 153(d); Hourihan v. National Labor Relations Board, 91 U. S. App. D. C. 316, 201 F. 2d 187; Lincourt v. National Labor Relations Board, 1 Cir., 170 F. 2d 306."

Petitioners submit that the rulings of the General Counsel, acting within the scope of his statutory authority, should have been accorded the same legal significance by the court below as the rulings of the National Labor Relations Board itself. The Wisconsin Supreme Court interpreted the rule laid down in *Garmon* as preventing this result. Apparently, the Wisconsin Supreme Court was

influenced by the language on pages 245, 246 of the *Garmon*[1] case, in which this Court stated:

> "To require the States to yield to the primary jurisdiction of the National Board does not insure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction, or the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by the refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance."

The foregoing excerpt from *Garmon*[1] certainly cannot mean that every time the General Counsel declines to file a complaint, the nature of the activity is left undetermined. Where the General Counsel, as in this case, determines that the limitations and restraints of Section 8(b)(7) of the federal Act upon organizational and recognition picketing cannot be applied because the unit personnel are supervisors and not employees within the meaning of the Act, the finding is jurisdictional because the Act excludes supervisors from its coverage. The General Counsel is empowered by law to make this finding on behalf of the Board. Therefore, state courts should be bound by such determinations of the General Counsel and apply them in subsequent litigation on the same basis as determinations made by the National Labor Relations Board itself.

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[1] *San Diego Unions v. Garmon*, 359 U. S. 236.

An authoritative determination, by this Court, of the effect of the rulings of the General Counsel in the indicated area, is, we respectfully submit, urgently required.

II.

The Opinion of the Supreme Court of Wisconsin is based upon that Court's understanding of the principles laid down by this Court in *San Diego Unions v. Garmon*, 359 U. S. 236, and *Marine Engineers Beneficial Association v. Interlake Steamship Co.*, 370 U. S. 173, and certain sections of the Labor Management Relations Act, Title 29, U. S. C. A. § 141, et seq. Although the petitioners obtained "initial determinations" from the National Labor Relations Board and its General Counsel upon all of the issues regarded as arguably subject to the Labor Management Relations Act, the court below nevertheless concluded that the controversy was within the exclusive jurisdiction of the National Labor Relations Board and this pre-emption ousted the Wisconsin courts from any jurisdiction to enjoin organizational picketing of supervisors illegal under Wisconsin law. Important questions concerning the applications of the principles in *Garmon* and *Interlake* arise and should be resolved, as acknowledged by the Supreme Court in Wisconsin in its Opinion (R. 116):

> "We recognize that in the circumstances of this case, the rule produces something of a paradox. MEBA's alleged organizational picketing is unlawful under Wisconsin law, and is probably not protected by federal law because of the supervisory status of the marine engineers. Such picketing cannot be prevented by NLRB procedure unless the NLRB General Counsel has probable cause to believe that MEBA's conduct is a secondary boycott. Yet since such picketing approaches being unlawful under federal law as a secondary boycott, Wisconsin must decline to en-

join it. On the record before us, we can perceive no escape consistent with the *Garmon* decision."

Petitioners were unable to obtain a hearing on the merits before the National Labor Relations Board or in the courts of Wisconsin; the procedural problems encountered by the petitioners are demonstrated by the proceedings before the Board and in the Wisconsin courts.

The Regional Director for the NLRB in Cleveland dismissed petitioners' petition for a representation election upon the ground that the marine engineers in the unit are supervisors as defined in Section 2(11) of the Act (R. 86, 87); the Board affirmed the Regional Director's dismissal of the election petition upon the ground that a unit of supervisors is inappropriate and thus no question concerning representation exists within the meaning of the Act (R. 46, 47).

Petitioners filed charges under Section 8(b)(4) of the Act against the MEBA alleging secondary boycott activity in Duluth (R. 79, 80); similar charges were also filed against the International Longshoremens Association which represented the dock workers. While these charges were under investigation, petitioners furnished information and affidavits to the Board's Regional Director at Minneapolis regarding the picketing and other activities of the MEBA at Superior, Wisconsin, and many other Great Lakes ports.

The Regional Attorney and Regional Director ruled that no violation of Section 8(b)(4) of the Act "is indicated" on the part of the MEBA (R. 88 to 93) or "has occurred" by the International Longshoremens Association (R. 94 to 95, 90 to 91). These determinations were affirmed by the General Counsel for the NLRB (R. 48 to 51) on the ground that there was insufficient evidence to establish that either the MEBA or ILA had engaged in

any unlawful secondary activity, and that the picketing conformed to the standards prescribed for primary common situs picketing under *Moore Dry Dock*, 92 NLRB 547. With respect to picketing at other ports, including Superior, Wisconsin, the General Counsel's office stated (R. 49):

> "Furthermore, MEBA's activity at other sites does not evince an unlawful object on the part of the Union inconsistent with the ostensibly primary object of the picketing at the situs of the dispute. Nor did the totality of its conduct establish the unlawfulness of its activity."

Petitioners filed charges against the MEBA with the Board's Regional Director at Cleveland, Ohio, alleging a violation of Section 8(b)(7) of the Act (effective November 1959) which limits and restrains organizational and recognition picketing. The Regional Director dismissed the charge stating that there was insufficient evidence of picketing for an object proscribed by Section 8(b)(7) of the Act (R. 51 to 53). Upon appeal, the General Counsel for the Board sustained the ruling of the Regional Director that there was insufficient evidence of picketing proscribed by Section 8(b)(7) of the Act "particularly in view of the fact that the Union was seeking representation rights in a unit composed solely of supervisors as distinguished from employees within the meaning of the Act" (R. 53, 54). Upon request for clarification, the General Counsel's office stated that (R. 55, 56):

> "Our disposition of this case was predicated solely on our conclusion that the supervisory status of the licensed engineers precluded a finding that the union's picketing and other activity was for an object proscribed by Section 8(b)(7) of the Act. Moreover, having reached a conclusion which, in our view was dispositive of the charge in this matter, the appeal was

denied without considering what the posture of the case would have been had the unit personnel been employees within the meaning of Section 2(3) of the Act. We might add that in processing the appeal in this manner, this office acted in accordance with its established practice. Accordingly, we have no alternative but to deny your request for reconsideration and to consider this case closed."

The verified complaint thereafter filed by the petitioners in the Circuit Court for Douglas County, Wisconsin, described the steps taken with the National Labor Relations Board and copies of the various rulings were attached. Upon consideration, the Wisconsin Circuit Court dismissed the complaint, as later amended for clarification, despite the rulings of the NLRB and its General Counsel, without a hearing on the merits, stating, in part (R. 5 to 7, App. pp. 44-45, *infra*):

"At the time the original restraining order was issued, the court thought that this declination to act by the Board gave the state court jurisdiction in a case involving supervisors, but after studying labor cases for two weeks, the matter does not appear so simple. The fact that the National Labor Relations Board declined to act in a particular case does not necessarily give the state court jurisdiction. Further, we do not know the facts in the present case are exactly the same as the case which the National Labor Relations Board investigated in the fall of 1962 before it issued such order. The complaint in this case, at least 'arguably,' alleges facts which would be a secondary boycott, which are within the jurisdiction of the National Labor Relations Board.

"The United States Supreme Court has said repeatedly that the state court should stay out of labor disputes in any case in which there was a possibility that the National Labor Relations Board might have jurisdiction thereon. This means in effect that the

state court must stay out of any labor dispute affecting interstate commerce, as this dispute clearly does, unless the United States Supreme Court or the National Labor Relations Board has clearly indicated that the state court may act * * * the court cannot say that the National Labor Relations Board's actions since that date has been so definite and certain as to give the state court jurisdiction in this case."

The Supreme Court of Wisconsin affirmed its Circuit Court but noted that the alleged organizational and recognition picketing of the MEBA was unlawful in Wisconsin under the rule established by *Vogt, Inc. v. International Brotherhood*, 270 Wis. 315, affirmed 354 U. S. 284 (R. 110). The *Garmon*[1] and *Interlake*[2] cases were reviewed and the court below decided that (R. 112 to 113; App. p. 38, *infra*):

"If the activity does not constitute a secondary boycott, the reason would seem to be that the activity was no more than 'primary picketing,' and apparently the Regional Director and General Counsel were not convinced that the activity went beyond primary picketing. It would seem to us, in contemplation of the Garmon role as stated by the Supreme Court, that the drawing of the distinction between the secondary boycott and primary picketing should surely be performed by the NLRB. It may well be of significance also, that the activity considered by the General Counsel took place in Duluth, Minnesota in 1962, and the conduct which is made the basis for injunction occurred in Superior, Wisconsin, at later dates, and must at least differ in detail, if not in relevant substance."

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[1] *San Diego Unions v. Garmon*, 359 U. S. 236.

[2] *Marine Engineers Beneficial Association v. Interlake S. S. Co.*, 370 U. S. 173.

It appears that both the Circuit Court and the Supreme Court of Wisconsin understand the decisions of this Court to require the National Labor Relations Board to make comprehensive rulings particularizing the nature of the labor activity to pave the way for state court jurisdiction. However, the Board refused to provide any opinions to the petitioners in the nature of a declaratory judgment (R. 46) which would clarify state court jurisdiction.

The scope of an initial determination of the National Labor Relations Board cannot be demonstrated without a hearing in which evidence can be introduced to show what has been initially presented to and considered by the Board. This is particularly true with regard to the MEBA picketing at Superior, Wisconsin, which was presented to the Board's Regional Director at Minneapolis by means of affidavits from witnesses in support of the petitioners' secondary boycott charges, and this Regional Director was advised of other picketing activities of the MEBA in order that a complete determination of a possible violation of Section 8(b)(4) could be made. Such matters were covered in the General Counsel's statement in the final determination on the secondary boycott charges (R. 49):

> "Nor did the totality of its conduct establish the unlawfulness of its activity."

We submit that petitioners' amended complaint presented a prima facie case of illegal organizational and recognition picketing under the Wisconsin law with these initial determinations of the Board and its General Counsel which authorized the Wisconsin courts to exercise jurisdiction and permit the petitioners to present evidence on the merits including the scope of the matters presented to the Board. The facts should not be determined by speculation. Only a hearing will enable any party in this pre-

dicament to show that state court action will not conflict with federal labor policy. The picketing at Superior, before and after the General Counsel's determination, was identical; the same picket signs were used; many of the same pickets appeared; they stood in the same place; and they acted in the same way.

When the sufficiency of a complaint is challenged, the pleader should be given the benefit of every reasonable inference from well pleaded facts. This rule prevails in Wisconsin, 2 *Wisconsin Pleading and Practice*, pages 363-364, as well as in this Court as stated in *Retail Clerks et al. v. Schermerhorn*, 373 U. S. 746 (1963), footnote, pages 753-754:

> "In any event, we have only the pleadings and we are bound to give the respondent the benefit of every reasonable inference from well pleaded facts."

The facts here closely parallel those in *Marine Engineers Beneficial Association v. Interlake S. S. Co.*, 370 U. S. 173, in which the same union picketed Great Lakes vessels in Duluth, Minnesota, to coerce the company to compel marine engineers to accept the union as bargaining agent. The MEBA picketing caused coal dock employees to refuse to unload the vessels. Interlake filed a complaint in a Minnesota court charging violations of Minnesota law without first filing with the NLRB for "initial determinations." The MEBA moved to dismiss the Minnesota state court action claiming that the dispute was arguably subject to NLRB jurisdiction. Evidence was taken on the picketing, the status of the engineers and the status of the MEBA. The Minnesota court concluded that the engineers were "supervisors" excluded from the coverage of the National Labor Relations Act, that the MEBA was not a "labor organization" within the meaning of the Act since "supervisors" were involved, denied the mo-

tion to dismiss and enjoined the picketing. The MEBA appealed to this Court, claiming potential NLRB jurisdiction of prohibited activity under Section 8(b)(4) (secondary boycott) of the federal Act and thus within the primary jurisdiction of the NLRB if the MEBA was a "labor organization." The MEBA contended that state courts were not free to decide these issues arguably subject to the Labor Management Relations Act, but that such issues must be first submitted to the NLRB for initial determinations. This Court reversed the Minnesota courts because of this failure to submit "arguable issues" for initial Board determinations.

In compliance with the principles laid down in *Interlake*,[1] *supra*, petitioners presented all of the issues to the NLRB for initial determinations. Rulings were obtained that the engineers were "supervisors," that there was no secondary boycott activity proscribed by Section 8(b)(4) of the federal Act, and that the organizational and recognition picketing limitations of Section 8(b)(7) of the Act did not apply because the engineers were supervisors. These initial determinations were furnished to the Wisconsin courts with petitioners' complaint for injunctive relief against the organizational and recognition picketing illegal under Wisconsin law. The dismissal of the petitioners' complaint was based upon the interpretation made by the Wisconsin Supreme Court of the requirements laid down by the decisions of this Court.

This petitioner, and the other litigants similarly situated, are cast into a dilemma by the view taken by the Wisconsin courts. No relief can be obtained under state law against organizational and recognition picketing by a labor organization if the unit of personnel for whom recog-

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[1] *Marine Engineers Beneficial Association v. Interlake S. S. Co.*, 370 U. S. 173.

nition as bargaining agent is sought is composed of individuals who are excluded from the coverage of the Labor Management Relations Act, such as supervisors. The whole field of potential relief is compressed into the possibility that the labor organization may eventually violate Section 8(b)(4) of the Act by engaging in secondary boycott activity which the National Labor Relations Board will suppress. In the meantime, state limitations upon organizational picketing, according to the Wisconsin courts, cannot be applied. Thus, we submit, is untenable.

This Court has specifically held that the federal Labor Management Relations Act has not completely pre-empted the field. States are free to regulate labor activities where doing so does not conflict with matters which have been pre-empted to the National Labor Relations Board by the federal Act. As stated in *Garner v. Teamsters Union*, 346 U. S. 485, on page 488:

> "The National Labor-Management Relations Act, as we have pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible."

In *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468 on pages 480-481:

> "By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial ex-

clusion of state action. Such was the situation in Garner vs. Teamsters Union, Supra, but as the opinion in that case recalled, the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.' 346 U. S., at 488. This penumbral area can be rendered progressively clear only by the course of litigation."

The concept of *partial* federal pre-emption in the regulation of labor activities is the only perceptible reason why it was considered necessary by this Court to require the submission of arguable issues to the National Labor Relations Board for initial determinations. If federal preemption were total, there would obviously be no necessity for drawing boundary lines between state and federal jurisdiction. Thus, it has been said, that union activity which is neither protected nor prohibited by the federal Act can be regulated by the states.

Individuals employed as supervisors are excluded from the coverage of the Labor Management Relations Act by Section 2(3) and Section 14(a). Hence, union activity directed against supervisors exclusively is a matter to be governed by the states or left ungoverned. Where, as in this case, the union activity involved would be proscribed by the federal Act except for the exclusion of supervisors, there cannot be any conflict with federal labor policy in the application of a similar state law to limit and restrain organizational and recognition picketing. This obviously is not an area which was purposely left open by Congress to the free interplay of economic forces and state regulation would not be repugnant to federal labor policy.

In reporting upon the amendment which added Section 8(b)(7) to the Act (effective November 13, 1959), the *Senate Report, U. S. Code Congressional and Administrative News*, 1959, Vol. 2, stated on page 2381:

"Such picketing also has a purpose of coercing the employer into recognizing the union and signing a contract with it, thus forcing the employees to join, even though the employees do not want the union as their bargaining agent. The employer is thus coerced by the threat to his business to violate the law by coercing his employees into joining the union. It would be difficult to imagine a tactic more alien to the free choice with respect to unionization that the Taft-Hartley Act guaranteed to employees."

The Courts below concluded that some issues remained arguably subject to National Labor Relations Board jurisdiction despite the final determinations by the Board and its General Counsel upon these same issues. For example, the Supreme Court of Wisconsin stated (R. 114, App. pp. 38-39, *infra*):

"If the picketing were deemed no more than primary, and if the marine engineers whom MEBA is seeking to represent were non-supervisory, plaintiff's claim arguably charges an unfair labor practice under Section 8(b)(7) of NLRA making it an unfair labor practice for a labor organization to picket an employer in order to force him to recognize it as a representative of employees for whom it has not been properly certified. Plaintiffs do not appear to claim that it is not arguable that the marine engineers are employees under the Act. Indeed, they filed the charge on the basis (presumably) that they were employees, and are asking the state courts to proceed upon the General Counsel's refusal to file a complaint."

The Circuit Court of Wisconsin stated (R. 6, App. p. 45, *infra*):

"The complaint in this case, at least, 'arguably' alleges facts which would be secondary boycott, which are within the jurisdiction of the National Labor Relations Board."

The Courts below should have accepted and applied the "initial determinations" of the Board and its General Counsel but refused to do so. Instead, the Circuit Court regarded the possibility of secondary boycott activity as "arguable" even though the General Counsel ruled that there was no evidence of such activity proscribed by the federal Act, and the Wisconsin Supreme Court thought that the petitioners conceded the continued "arguability" of the marine engineers' status as "employees" under the federal Act by filing a charge under Section 8(b)(7) alleging organizational and recognition picketing and then requesting the state courts to proceed to enjoin the same picketing upon the General Counsel's refusal to file a complaint.

We submit that the determinations of the National Labor Relations Board and its General Counsel must be accepted as final by the courts. Otherwise, a "paradox" results because the "special competence" of the National Labor Relations Board is ignored. This, in effect, creates total rather than partial pre-emption because the arguability presented in any issue cannot be resolved. If a cohesive national labor policy requires initial determinations by the Board, then those same determinations must be adopted as final to maintain a uniform policy.

The status of state court jurisdiction after "arguable issues" have been resolved by "initial determinations" of the National Labor Relations Board and its General Counsel should be clarified. Under the initial determinations in this case, petitioners submit that the Wisconsin courts should have asserted jurisdiction and permitted petitioners an opportunity to present their evidence, which would include the scope of the Board rulings. A litigant denied National Labor Relations Board relief with finality based upon the exclusion of personnel and activity from the

coverage of the federal Act and who thereafter seeks a remedy under state law ought to be granted a hearing in which any alleged arguability remaining can be fully developed and considered. Otherwise, the procedural rules laid down by this Court for molding a cohesive national labor policy are twisted into an obstacle to state jurisdiction which could not have been intended and used to protect organizational and recognition picketing which is illegal under both state and federal law.

CONCLUSION.

This case contains fundamental questions involving practice and procedure under an important federal statute. It also involves the equally important question of the function and power of the state courts in the field of labor relations. This petition for a writ of certiorari should be granted so that they can be resolved.

Respectfully submitted,

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APPENDIX.

OPINION AND JUDGMENT OF THE SUPREME COURT OF WISCONSIN.

(Filed April 13, 1964.)

(Caption omitted.)

APPEAL from an order of the circuit court for Douglas County, ALLEN KINNEY, Circuit Judge. *Affirmed.*

Action by The Hanna Mining Company, National Steel Corporation, Hansand Steamship Corporation and The Hanna Furnace Corporation, against District 2, Marine Engineers Beneficial Association, AFL-CIO (hereinafter called MEBA), and several of its officers, to enjoin defendants, agents, officers and members of MEBA, and others acting in concert with them from picketing plaintiffs' vessels and the docks where they are located.

The action was commenced June 25, 1963, by service of a summons, complaint, order to show cause and restraining order, and supporting affidavits. Defendants appeared specially and moved for dismissal on the ground (not involved on this appeal) of lack of jurisdiction over the persons of defendants and on the ground that "The Court lacks jurisdiction over the subject matter in that the National Labor Relations Board has exclusive jurisdiction of the subject matter herein." Affidavits supporting the motion were also filed. On July 15, 1963, after hearing on the motion, but before decision thereof, an amended complaint was served.

On July 26, 1963, the circuit court entered an order dismissing the complaint on the ground of lack of jurisdiction because the matter is within the jurisdiction of the NLRB, and vacating the restraining order. Plaintiffs appealed. Various proceedings were later had, not directly involved on this appeal, under which the restraining order

was continued in effect pending the appeal, but was vacated October 30, 1963, upon posting of bond by defendants.

The following facts appear, in substance, from the amended complaint and affidavits on file:

Plaintiff corporations own and operate vessels on the Great Lakes transporting cargoes in interstate and foreign commerce. One of the plaintiffs, The Hanna Mining Company, acts as the operating agent for all of the plaintiff's vessels, which are operated as one integrated fleet. The defendant association (MEBA) is a labor organization with a membership composed of licensed marine engineers.

Effective October 4, 1961, Hanna Mining entered into a labor agreement with MEBA governing the terms of employment of licensed marine engineers employed aboard plaintiffs' vessels, and this agreement terminated July 15, 1962. During subsequent negotiations a majority of such engineers notified Hanna Mining that they did not want to be represented by MEBA and Hanna Mining took the position that further negotiations with MEBA must be suspended until a majority voted for MEBA in a secret ballot election.

Plaintiffs alleged in the amended complaint that on September 12, 1962, MEBA commenced picketing plaintiffs' vessels in Superior, Wisconsin, and other ports

> "with the unlawful objectives of forcing, coercing and compelling plaintiffs to recognize and bargain with [MEBA] as the union representative of the said engineers and forcing, coercing and compelling the said engineers to join, accept and select [MEBA] as their collective bargaining representative without any opportunity to determine whether or not [MEBA] represented a majority of the said engineers by means of a properly conducted election * * *."

They alleged that the picketing continued until the close of the 1962 navigation season, and was resumed at the commencement of navigation in April, 1963.

Plaintiffs also alleged in the amended complaint

> "that the said picketing has had and will continue to have the harmful effect of causing work stoppages among individuals employed by other employers and of preventing harbor tugs from rendering towage services, all of which delay and endanger plaintiffs' vessels, thus inflicting economic losses to plaintiffs and causing hazards to such vessels and their crews because dock workers, tug crews and other individuals employed by other employers decline to cross picket lines or are caused to refuse to perform services for plaintiffs as a result of the said picketing * * *."

On September 12, 1962, Hanna Mining filed a petition with the regional director of NLRB at Cleveland, Ohio, requesting a representation election with respect to its marine engineers. The regional director dismissed the petition, stating that:

> "As a result of the investigation, it appears that, because the employees in the proposed unit are not employees within the meaning of Section 2(3) of the Act, being employed as supervisors as defined in Section 2(11) of the Act, further proceedings are not warranted at this time."

Upon request for review, the NLRB

> "concluded that, as the Appellant's appeal makes no affirmative claim that a majority of the 'employees' as distinguished from 'supervisors' are sought to be represented in an appropriate unit and as a unit of supervisors is otherwise inappropriate, no question concerning representation in an appropriate unit exists * * *
>
> "Moreover, the apparent request of the Appellant for a declaratory judgment by the Board cannot be

considered in an original representation proceeding * * *. Accordingly, the Regional Director's dismissal of the petition was warranted."

On September 15, 1962, Hanna Mining filed a charge with the regional director of NLRB at Minneapolis, Minnesota, claiming that MEBA had engaged in illegal secondary boycott activity which would be an unfair labor practice under Sec. 8(b)(4) of NLRB by inducing and encouraging individuals employed by the North Western Hanna Fuel Company at Duluth, to engage in a boycott of one of these vessels. The regional director refused to issue a complaint, stating that investigation indicated that the inducement of the employees of secondary employers was limited to inducing them to cease performing services aboard the ship.

Upon appeal, the general counsel of NLRB sustained the regional director's ruling, saying:

"* * * It was concluded that the evidence was insufficient to establish that either respondent engaged in unlawful secondary activity, as alleged. In this connection, the evidence revealed that the picketing by MEBA at the common situs herein conformed to *Moore Dry Dock* standards (92 NLRB 547), notwithstanding that picketing continued after the vessel was abandoned (cf. *Ingram Barge Co.*, 136 NLRB No. 112), and that oral appeal by MEBA pickets to personnel of the neutral employer were for action solely with respect to the primary situs and did not constitute unlawful activity within the meaning of Section 8(b)(4) of the Act. Cf. *Pure Oil Company*, 84 NLRB 315. Furthermore, MEBA's activity at other sites did not evince an unlawful object on the part of the Union inconsistent with the ostensibly primary object of the picketing at the situs of the dispute. Nor did the totality of its conduct establish the unlawfulness of its activity."

On September 27, 1962, Hanna Mining filed a charge with the regional director of NLRB at Cleveland, Ohio, claiming that MEBA had engaged in an unfair labor practice under Sec. 8(b)(7) of NLRA by picketing the vessels with the unlawful object of forcing plaintiffs to bargain with MEBA or forcing the engineers to accept MEBA as their representative. The regional director refused to issue a complaint because "there is insufficient evidence that there was picketing of, or a threat to picket, an employer for an object proscribed by Section 8(b)(7) of the Act * * *."

Upon appeal, the general counsel sustained the ruling of the regional director, and explained:

> "Our disposition of this case was predicated solely on our conclusion that the supervisory status of the licensed engineers precluded a finding that the Union's picketing and other activity was for an object proscribed by Section 8(b)(7) of the Act * * *."

Counsel for MEBA filed an affidavit establishing that NLRB has ruled in other cases that MEBA is a labor organization within the meaning of NLRA because some of its members are not supervisors and are employees within the meaning of NLRA.

No claim is made that the picketing involved or threatened violence.

FAIRCHILD, J. The gist of plaintiff's claim, upon the merits, appears to be that MEBA's picketing, although non-violent, is for an unlawful purpose, and plaintiffs are therefore entitled to an injunction. Allegedly, MEBA is attempting to coerce plaintiffs to bargain with MEBA as the representative of the marine engineers, against the wishes of a majority of the latter. The picketing is allegedly intended to induce others to refuse to perform essential

services for plaintiffs' vessels, in order to present plaintiffs with the choice between suffering substantial loss and unlawfully bargaining with MEBA. Under a similar theory, this Court affirmed an injunction against otherwise peaceful picketing in *Vogt, Inc. v. International Brotherhood.*[1]

Because of the nature of plaintiffs' business, the effect of disruptions therein upon interstate and foreign commerce is obvious. Plaintiffs are employers within the meaning of NLRA,[2] and their nonsupervisory personnel are employees within its meaning. MEBA on the other hand has been held by NLRB to be a labor organization within the meaning of NLRA because some of the members of MEBA are employees as defined in NLRA.[3] Thus the question immediately arises whether a state court has any jurisdiction to deal with the merits of the matter.

The general rule (in the absence of mass picketing, violence or overt threats of violence[4]) and some of the considerations upon which the rule is based, have been laid down by the Supreme Court of the United States in *San Diego Unions v. Garmon*[5] as follows:

> "At times it has not been clear whether the particular activity regulated by the States was governed by Sec. 7 or Sec. 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the adminis-

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[1] (1956), 270 Wis. 315, 71 N. W. (2d) 359, affirmed in *Teamsters Union v. Vogt, Inc.* (1957), 354 U. S. 284, 77 Sup. Ct. 1166, 1 L. Ed. (2d) 1347.

[2] 29 USCA Sec. 141ff.

[3] See *Marine Engineers v. Interlake Co.* (1962), 370 U. S. 173, 82 Sup. Ct. 1237, 8 L. Ed. (2d) 418.

[4] *Auto Workers v. Wisconsin Board* (1956), 351 U. S. 266, 76 Sup. Ct. 794, 100 L. Ed. 1162; *Youngdahl v. Rainfair, Inc.* (1957), 355 U. S. 131, 78 Sup. Ct. 206, 2 L. Ed. (2d) 151.

[5] (1959), 359 U. S. 236, 244, 245, 246, 79 Sup. Ct. 773, 3 L. Ed. (2d) 775.

tration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board.

"* * *

"To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by Sec. 7, or prohibited by Sec. 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem underlying our decision in *Guss v. Utah Labor Relations Board,* 353 U. S. 1. In that case we held that failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. The withdrawal of this narrow area from possible state activity follows from our decisions in *Weber* and *Guss.* The governing consideration is that

to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy."

In later cases, the Supreme Court of the United States has held that state courts have no power to enjoin activity which is an arguable violation of sec. 8(b) of the NLRA,[6] or is arguably protected by the NLRA.[7]

The *Garmon* rule has been recently applied by the Supreme Court of the United States to the question of whether an organization (MEBA, as it happens) is a labor organization under NLRA. Where MEBA's conduct was of a kind arguably prohibited by NLRA if MEBA were a labor organization under NLRA, a state court must decline to assert jurisdiction over the activity as soon as the evidence before it is sufficient to show that MEBA is "arguably a 'labor organization'."[8]

Picketing of a type commonly referred to as recognition picketing is made an unfair labor practice by Sec. 8(b)(7) of NLRA, but such is not an unfair labor practice in the present case if the objects of the picketing, *viz*: the plaintiffs' marine engineers, are deemed supervisory personnel and thus are not employees within the meaning of NLRA. Sec. 8(b)(4), however, prohibits secondary boycotting which occurs when a union directs pressure, whether by strike or otherwise, against an employer or

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[6] *Construction Laborers v. Curry* (1963), 371 U. S. 542, 546, 83 Sup. Ct. 531, 9 L. Ed. (2d) 514.

[7] *Liner v. Jafco, Inc.* (1964), 375 U. S. 301, 84 Sup. Ct. 391, 11 L. Ed. (2d) 347.

See *Local 248, U. A., A. & A. I. W. v. Wisconsin E. R. Board* (1960), 11 Wis. (2d) 277, 105 N. W. (2d) 271, certiorari denied (1961), 365 U. S. 878, 81 Sup. Ct. 1028, 6 L. Ed. (2d) 190, and *Markham v. American Motors Corp.* (1964), 22 Wis. (2d) 680, 685, 126 N. W. (2d) 753, at 755.

[8] *Marine Engineers v. Interlake Co., supra*, p. 177, footnote 3.

other person with whom it has no dispute or grievance, for the purpose of persuading or coercing that neutral person to stop dealing with a primary party with whom the union has a dispute, as a means of exerting pressure on the primary party.[9] Sec. 8(b)(4) of the NLRA provides as follows:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(4) (i) to engage in or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"* * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 159 of this title: *Provided*, that nothing contained in the clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

"* * *" [10]

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[9] See CCH, Labor Law Reporter, para. 5220, p. 10,534 ff.

[10] 29 USCA, p. 54, sec. 158.

As seen from the foregoing there is or may be a common denominator between recognition picketing and secondary boycotting. In both coercion may be accomplished through the effect of the activity upon neutral third parties. Plaintiffs' claim that MEBA, considered as a labor organization, is coercing plaintiffs by inducing work stoppages among dock workers and tug crews, employed by others, arguably charges an unfair labor practice under sec. 8(b)(4)(B) of NLRB, relating to so-called secondary boycott. If the activity does not constitute a secondary boycott, the reason would seem to be that the activity was no more than "primary picketing," and apparently the regional director and general counsel were unconvinced that the activity went beyond primary picketing. It would seem to us, in contemplation of the *Garmon* rule as stated by the supreme court, that the drawing of the distinction between a secondary boycott and primary picketing should surely be performed by the NLRB. It may well be of significance also, that the activity considered by the general counsel took place in Duluth, Minnesota, in 1962, and the conduct which is made the basis for injunction occurred in Superior, Wisconsin, at later dates, and must at least differ in detail, if not in relevant substance.

If the picketing were deemed no more than primary, and if the marine engineers whom MEBA is seeking to represent were non-supervisory, plaintiffs' claim arguably charges an unfair labor practice under sec. 8(b)(7) of NLRB making it an unfair labor practice for a labor organization to picket an employer in order to force him to recognize it as the representative of employees for whom it has not been properly certified. Plaintiffs do not appear to claim that it is not arguable that the marine engineers are employees under the Act. Indeed they filed a charge

on the basis (presumably) that they were employees, and are asking the state courts to proceed upon the general counsel's refusal to file a complaint.

Plaintiffs acknowledge the *Garmon* rule to the extent that a state agency or court has no jurisdiction over conduct arguably subject to NLRA until the NLRB has made a final determination that the conduct is not so subject. They stress the references in *Garmon* to the "exclusive primary competence" and "primary jurisdiction" of the NLRB and the statement that the determination must be "left in the first instance" to NLRB, and to the statement in *Marine Engineers v. Interlake Co., supra* (p. 185), that "While the Board's decision is not the last word, it must assuredly be the first." They argue that the rulings of the general counsel are determinations of the NLRB. Thus they assert that they have fufilled the *Garmon* rule for avoidance of conflict between NLRB and courts and state agencies. Since, they would say, it has been finally determined that the conduct complained of is not an unfair labor practice, and presumably that such conduct is not protected by the Act because of the supervisory status of the people who are the object of MEBA's effort, the state is now free to apply its own law. Bypassing any difference between the conduct now alleged and the conduct complained of in Duluth, Minnesota, plaintiffs' logic seems clear, if they properly accord final legal significance to the acts of the general counsel. But we do not read *Garmon* as permitting this result.

We consider that where a state agency or court is asked to restrain picketing which affects interstate or foreign commerce, under circumstances not within recognized areas of concurrent jurisdiction such as violent conduct, such agency or court must decline jurisdiction unless it be demonstrated that the activity is neither prohibited nor

protected by NLRA. Such demonstration can be accomplished only where undisputed facts show conclusively that NLRA does not prohibit nor protect the activity, or where "compelling precedent applied to essentially undisputed facts" so shows, or NLRB has clearly so determined. Such determination is not made, however, by NLRB's failure "to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance." [11]

We recognize that in the circumstances of this case, the rule produces something of a paradox. MEBA's alleged organizational picketing is unlawful under Wisconsin law, and is probably not protected by federal law because of the supervisory status of the marine engineers. Such picketing cannot be prevented by NLRB procedure unless the NLRB general counsel has probable cause to believe that MEBA's conduct is a secondary boycott. Yet since such picketing approaches being unlawful under federal law was a secondary boycott, Wisconsin must decline to enjoin it. On the record before us we can perceive no escape consistent with the *Garmon* decision.

By the Court.—Order affirmed.

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[11] *San Diego Unions v. Garmon, supra,* footnote 5.

ORDER OF THE SUPREME COURT OF WISCONSIN DENYING MOTION FOR REHEARING.

And afterwards to-wit on the 30th day of June, A. D. 1964, the same being the 135th day of said term, the following proceedings were had in said cause in this court:

(Caption omitted.)

The Court being now sufficiently advised of and concerning the motion of the said appellants for a rehearing in this cause, it is now here ordered that said motion be, and the same is hereby denied with costs against said appellants.

MEMORANDUM OPINION OF THE CIRCUIT COURT FOR DOUGLAS COUNTY, WISCONSIN.

(Dated July 25, 1963.)

(Caption omitted.)

The dispute in the above case arose from the picketing of an ore carrying boat in the harbor of Superior, Wisconsin. The operator of the boat is the Hanna Mining Company, a Delaware corporation with its principal office and place of business at 1300 Leader Building, Cleveland 14, Ohio, and the organization doing the picketing was District 2 of the Marine Engineers Beneficial Association, AFL-CIO, 190—21st Street, Brooklyn 32, New York, an unincorporated association. Said association, hereinafter designated "MEBA," has been picketing all boats owned by said Hanna Company wherever they appear on the Great Lakes since September of 1962. All unlicensed personnel employed by the Hanna Company are represented

by the United States Steel Workers of America, Local 7000, AFL-CIO, and they are not involved in this matter and apparently take no cognizance of the picketing by MEBA. The object of the picketing by MEBA is to organize the licensed personnel on Hanna boats, the engineers.

On the 25th day of June, 1963, an order was issued by this Court temporarily restraining said picketing, said order being returnable at 10:00 o'clock on the 1st day of July, 1963. The hearing on said matter was postponed by agreement of counsel to the 8th day of July, 1963 at 10:00 o'clock a.m. and on said date argument was held, the plaintiffs being represented by Johnson, Fritschler, Barstow and Witkin, Superior, Wisconsin, by B. B. Barstow and Paul Witkin, Montague, Applequist, Lyons, Nolan, Donovan and Kretsch, Duluth, Minnesota, by Kermit Kretsch, and by McCreary, Hinslea and Ray, Cleveland, Ohio, by John Hanninen. The defendants were represented by Borg, McGill and Moodie, Superior, Wisconsin, by P. G. McGill, and by Pressman and Scribner of New York, New York, by David Scribner.

The first issue to be decided in this case, as it is in every case in which a state court is involved in a labor matter, is whether the state court has jurisdiction over the matter at all, or whether the matter is within the jurisdiction of the National Labor Relations Board, and the argument had on July 8, 1963 was restricted to such point. The facts in this case to begin with seem to be very similar to the facts in Marine Engineers Beneficial Association vs. Interlake Steamship Company, 370 U. S. 173, decided by the Supreme Court on June 11, 1962. That was a case in which the same defendant as here involved was picketing a ship in the harbor in Duluth, Minnesota in the same manner as was done in this case. The District

Court in Duluth issued a restraining order restraining such picketing just as was done in this case. The union appealed the case to the Minnesota Supreme Court and the Minnesota Supreme Court affirmed the lower court. The Minnesota court reasoned that the matter was not within the jurisdiction of the National Labor Relations Board because the persons that MEBA was trying to organize were not employees but were supervisors within the meaning of the National Labor Relations Act, and the National Labor Relations Act does not apply to supervisors. The Union appealed the case to the United States Supreme Court and the United States Supreme Court reversed the Minnesota court. In its reversal the United States Supreme Court quoted extensively from the case of San Diego Building Trades Council vs. Garmon, 3 L. Ed. 2d 775, decided January 20, 1959, in which the court had stated that if any matter was arguably within the jurisdiction of the National Labor Relations Board, then the state court should defer to the National Labor Relations Board, and the initial determination as to whether such matter was or was not within the jurisdiction of the National Labor Relations Board should be determined by the Board. The court said that because of the fact that plaintiff below had alleged the violations of Section 8(b)(4) of the Act, the provision prohibiting secondary boycotts, such matter might be within the jurisdiction of the National Labor Relations Board. This was because, even though the persons that MEBA was attempting to organize in this particular case were all supervisors, MEBA did have certain members at other locations that were employees, so that MEBA was a labor organization within the meaning of the Act, and any violation of Section 8(b)(4) by a labor organization did come within the jurisdiction of the National Labor Relations Board.

Now we get to the difference between this case and the Minnesota case. The plaintiff in this case tried to follow the advice of the Supreme Court in the Minnesota case. When MEBA began picketing its ships in September of 1962, the plaintiff Hanna Mining Company did not come directly to the state court. It filed charges with the National Labor Relations Board. In fact, it filed two different charges with the National Labor Relations Board, one alleging that MEBA had violated Section 8(b)(4) of the Act, and a second, that MEBA had violated Section 8(b)(7) of the Act, a provision which prohibits organizational picketing except in certain circumstances specified in the Act.

The National Labor Relations Board dismissed the petition alleging violation of Section 8(b)(4) of the Act, stating that the activities alleged by MEBA did not violate such section. The National Labor Relations Board also refused to issue a complaint for a violation of Section 8(b)(7) of the Act, but the reason they gave for failure to issue a complaint in this case was that they could not do so for the reason that the persons MEBA was attempting to organize were all supervisors. They stated that they did not consider whether the particular acts alleged would have been a violation of Section 8(b)(7) if the persons that MEBA was attempting to organize had been employees, but such persons being supervisors, they were dismissing the complaint. At the time the original restraining order was issued, the Court thought that this declination to act by the Board gave the state court jurisdiction in a case involving supervisors, but after studying labor cases for two weeks, the matter does not appear so simple. The fact that the National Labor Relations Board declined to act in a particular case does not necessarily give the state court jurisdiction. Further, we do not know that the

facts in the present case are exactly the same as the case which the National Labor Relations Board investigated in the Fall of 1962 before it issued such order. The complaint in this case, at least, "arguably," alleges facts which would be a secondary boycott, which are within the jurisdiction of the National Labor Relations Board.

The United States Supreme Court has said repeatedly that the state courts should stay out of labor disputes in any case in which there was a possibility that the National Labor Relations Board might have jurisdiction thereof. This means in effect that the state court must stay out of any labor dispute affecting interstate commerce, as this dispute clearly does, unless the United States Supreme Court or the National Labor Relations Board has clearly indicated that the state court may act. The last word from the United States Supreme Court on a matter similar to this is the Minnesota case cited above decided June 11, 1962 in which case the United States Supreme Court said the state court should stay out. The Court cannot say that the National Labor Relations Board's action since that date has been so definite and certain as to give the state court jurisdiction in this case.

Therefore, it is determined that the Court does not have jurisdiction in this case, and the restraining order must be vacated and the complaint dismissed with costs. Attorneys for defendants may draw the order.

Dated July 25, 1963.

BY THE COURT:

ALLEN KINNEY, *Circuit Judge.*

ORDER OF THE CIRCUIT COURT FOR DOUGLAS COUNTY, WISCONSIN.

(Dated July 26, 1963.)

(Caption omitted.)

The above entitled matter having come before the Court pursuant to an Order to Show Cause herein dated June 25, 1963, and an Order having been thereon issued by this Court temporarily restraining picketing alleged in the Petition, Affidavits and Complaint on file herein, and said Order being returnable on July 1, 1963 and adjourned by Stipulation to July 8, 1963 on which date plaintiffs having appeared by Johnson, Fritschler, Barstow & Witkin of Superior, Wisconsin, by B. B. Barstow and Paul Witkin, and Montague, Applequist, Lyons, Nolan, Donovan and Knetsch of Duluth, Minnesota, by Kermit Knetsch, and by McCreary, Hinslea and Ray, Cleveland, Ohio, by John Hanninen, and the defendants specially appearing by Borg, McGill & Moodie of Superior, Wisconsin, by P. G. McGill, and by Pressman and Scribner of New York, New York, by David Scribner, and Motion having been filed by the defendants to dismiss the Complaint and to vacate the temporary restraining order, and the Court having read the Affidavits of the parties and having heard the arguments of counsel and being fully informed in the premises, and the Court having filed its Memorandum Opinion herein, the same having been served on the representative counsel, and the Court finding that the matter now before the Court is within the jurisdiction of the National Labor Relations Board and that this Court is without jurisdiction;

IT IS ORDERED that the Motion of the defendants to dismiss plaintiff's Complaint is granted and plaintiffs' Complaint is dismissed with costs to defendants.

IT IS FURTHER ORDERED that the plaintiff's application for a restraining order be and the same is hereby denied.

IT IS FURTHER ORDERED that the temporary restraining order issued by this Court on June 25, 1963, be and the same is hereby vacated for all purposes.

Dated July 26, 1963.

BY THE COURT:

ALLEN KINNEY, *Judge.*

STATUTES INVOLVED.

29 U. S. C. A. § 152(3).

"§ 152. Definitions

"When used in this subchapter—

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

29 U. S. C. A. § 158.

"§ 158. Unfair labor practices

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

"(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the

representative of such employees under the provisions of section 159 of this title;

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

"Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution:

* * * * *

"(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as

the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

"(A) Where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title.

"(B) where within the preceding twelve months a valid election under section 159 (c) of this title has been conducted, or

"(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

"Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection."

29 U. S. C. A. § 164.

"§ 164. Supervisors as union members; recognition by employers

"(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

29 C. F. R., Part 102,

Section 102.19.

Review by the general counsel of refusal to issue.—If, after the charge has been filed, the regional director declines to issue a complaint, he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds. The person making the charge may obtain a review of such action by filing a request therefor with the general counsel in Washington, D. C., and filing a copy of the request with the regional director, within 10 days from the service of the notice of such refusal by the regional director. The request shall contain a complete statement setting forth the facts and the reasons upon which the request is based.